

NGUYEN (Migration) [2019] AATA 3689 (5 August 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Thi Ngoc NGUYEN Mr Dinh Du TRAN Miss Thi Anh Duong TRAN
CASE NUMBER:	1713714
HOME AFFAIRS REFERENCE(S):	CLF2013/311257
MEMBER:	Russell Matheson
DATE:	5 August 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations; and • The secondary applicants meet: • cl.820.312(b) of Schedule 2 to the Regulations.

Statement made on 05 August 2019 at 8:53am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – Schedule 3 criteria – application lodged outside of relevant timeframe – compelling reasons for waiver – sponsor’s mental health condition – high level of care and support provided by applicant – emotional and financial hardship – decision under review remitted

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LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cls 820.211, 820.312; Schedule 3, Criterion 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (the Act).
3. The first named applicant (the applicant) is a 40-year-old female national of Vietnam. She applied for the visa on 18 December 2013 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because the delegate was not satisfied the applicant met Schedule 3 criterion 3001. The delegate found that the applicant was not the holder of a substantive visa at the time she lodged the partner visa application. The delegate considered the applicant's request to waive the Schedule 3 criteria, but after considering all the circumstances of the application, the delegate concluded there were not compelling reasons to waive the Schedule 3 criteria. The applicant seeks review of the delegate's decision.
5. The applicants appeared before the Tribunal on 22 November 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Michael Nguyen (the sponsor's son). The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. For the following reasons, the Tribunal has concluded that the **decision under review should be remitted**.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in this case is whether the applicant meets the Schedule 3 criteria (as attached to this decision), and if not, whether there are compelling reasons for not applying them.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

8. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003 and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
9. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application.
10. *Criterion 3001*
11. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.

12. Departmental records show the applicant's last substantive visa, a Student (Subclass 560) visa, ceased on 7 February 2000. The Tribunal finds that that date is the 'relevant day' within the meaning of criterion 3001(2)(c)(i) of Schedule 3.
13. As the partner visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.
14. Clause 820.211(2)(d)(ii) allows for this criterion to be waived if the Tribunal is satisfied that there are compelling reasons for not applying the criterion.

15. **Hearing**

16. The Tribunal notes the applicant remained unlawfully in Australia from 7 February 2000 until January 2014, a period of approximately 14 years. The Tribunal queried with the applicant why this occurred. The applicant stated that if she could have her time over she would have continued to study. She further stated that she was young and played around with her friends and followed them to Melbourne. The applicant said that she never received notice of her visa cancellation because she no longer lived at her stated address. The applicant also said that she knew she was unlawful in Australia because the school she was studying at had notified the Department of her non-attendance. The applicant told the Tribunal that she was ashamed and did not tell her parents in Vietnam that her student visa had been cancelled. The applicant also stated that her friend had told her not to contact the Department because they would send her home. The applicant informed the Tribunal that her parents had been supporting her financially until she started living with the sponsor. The Tribunal accepts the applicant knew that she remained in Australia unlawfully after her student visa was cancelled.

Compelling reasons

17. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
18. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
19. The Tribunal invited the applicant to present compelling reasons for not applying the criteria. The Tribunal has considered the couple's evidence concerning compelling circumstances including the additional documentary evidence presented by the applicant and the oral evidence given by the parties and two witnesses at the Tribunal hearing.
20. The applicant and sponsor stated that they had been living together since October 2010 and were married on 7 September 2013. The parties have provided little evidence to demonstrate cohabitation in a de facto relationship since October 2010. The Tribunal places little weight on the evidence provided that they were living together from October 2010. The Tribunal accepts the parties have been lawfully married for over five and a half years.
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22. The applicant and sponsor claim to be in a genuine spousal relationship and provided significant additional documentary evidence supporting their claim to the Tribunal; not limited to the following:
- Photographs;
 - Joint bank account statements;
 - Doctors' reports;
 - Rental receipts;
 - Correspondence from Medicare and Centrelink;
 - Joint private health insurance;
 - Joint car insurance;
 - Receipts for household purchases;
 - Marriage certificate; and
 - Documents/letters received by the parties at their home address.
23. The Tribunal notes the claim of the applicant and sponsor to be in a genuine relationship and the documents provided as evidence are supportive of their claim. The Tribunal notes that the criteria in cl.820.211(2)(a) requires that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). Accordingly, in the circumstances of this case, the Tribunal does not consider the existence of a genuine and continuing relationship a compelling reason for not applying the Schedule 3 criteria as it is already criteria which must be satisfied in order to meet the criteria in cl.820.211(2)(a). If the relationship itself cannot be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship.
24. While a genuine spousal relationship is considered the basic requirement for a partner visa application, the Tribunal accepts that a genuine relationship could be a compelling reason for not applying the Schedule 3 criteria. However, the Tribunal in this case is not satisfied, when considering all the circumstances of this couple, that the genuineness, mutual commitment, emotional support, continuing nature and longevity of the parties' relationship or the parties' temporary separation are, on their own, circumstances that should compel the Tribunal to not apply the Schedule 3 criteria.
25. The applicant told the Tribunal that the sponsor relies on her emotionally and physically due to his mental health issues. She further stated that the sponsor has schizophrenia and cannot do things on his own because he has memory loss. The applicant further stated that she looks after his welfare, maintains the household and makes sure he takes his medication. The sponsor gave evidence that he has been receiving treatment for his illness since 2005 and his illness has become worse since 2009. The sponsor said that he relies on the applicant to look after him to provide food and to ensure that he takes his medication. The sponsor told the tribunal that he has never applied for home care assistance and has

never been hospitalised because of his illness. The applicant gave evidence that the sponsor cannot live with her in Vietnam because he needs to stay in Australia to receive adequate medical care and his disability benefits (pension). The parties provide two statutory declarations post the review hearing from a social worker dated 20 May 2019 and a psychologist dated 27 May 2019. The social worker in conclusion states the sponsor's mental illness needs a high level of care 24 hours a day in managing his medication and his day to day life. The psychologist states in conclusion that the sponsor suffers from post-traumatic stress disorder (PTSD) and he is legally married to the applicant and the full-time care she provides to him is a level of care no other relatives, hospitals or nursing homes could be reasonably expected to match. The Tribunal accepts that the applicant provides significant care and support to the sponsor. The Tribunal acknowledges that the counsellor's and psychologist's reports along with the oral evidence of the applicant, sponsor and his son, all indicate the sponsor requires a high level of care and support from the applicant. The Tribunal found their evidence genuine and convincing. The Tribunal accepts that the applicant has been diagnosed with PTSD and is receiving a disability pension. The Tribunal accepts that the applicant provides emotional and physical support to the sponsor, in the circumstances of this case and given the sponsor's condition, the Tribunal considers that significant. The Tribunal, in the circumstances of this case, finds the high level of care and support provided by the applicant to the sponsor a compelling reason for the waiver.

26. The applicant gave evidence that the sponsor provides care, comfort and financial support to her and her children. She further stated that her children need the sponsor and they consider him to be their father and they are dependent upon him. The Tribunal accepts the children may consider the sponsor to be their father and they are dependent upon him. The applicant also stated that schooling in Australia is better than in Vietnam. The Tribunal accepts that the education system in Australia is superior to that in Vietnam. The two secondary applicants are dependent children living at home with the applicant and the sponsor. They are both full time students who are wholly dependent upon the applicant and sponsor for financial support for their basic needs such as food, clothing, shelter and education. The Tribunal considers the emotional and financial hardship the applicant and her children would suffer if they had to leave Australia and apply for a visa offshore compelling reasons to waive the Schedule 3 criteria.
27. Having considered all the circumstances of the relationship between the applicant and the sponsor singularly and cumulatively, including the length and the extent of their relationship and the evidence provided at the hearing by the parties, the Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria.
28. The Tribunal has formed the view that the severity of the sponsor's condition, his need for ongoing support and the level of support that is being provided by the applicant, that may not otherwise be available to the sponsor, and the emotional and physical hardship that would be incurred, constitute, in the circumstances of this case, compelling reasons for the waiver.
29. The Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii). As the Tribunal is satisfied there are compelling reasons for not applying the Schedule 3 criteria for the primary applicant, the same reasons apply in respect of the secondary applicant's.

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DECISION

34. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations; and

35. The secondary applicants meet:

- cl.820.312(b) of Schedule 2 to the Regulations.

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Russell Matheson
Member

- 36.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and

- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.